NG AH BA @ NG LOOI SENG & 2 ORS.

v.

RAMANDA SDN. BHD.

COURT OF APPEAL MALAYA
DATUK SHAIK DAUD BIN HJ. MOHD. ISMAIL JCA
TUAN GOPAL SRI RAM JCA
DATO' V.C. GEORGE JCA
[CIVIL APPEAL NO. P-02-8 OF 1994]
9 JANUARY 1995

PRACTICE & PROCEDURE: *Summary judgment - Whether properly granted - Summary judgment for specific performance of a sale and purchase agreement - Defence of conspiracy - Whether there were triable issues - Particulars of alleged conspiracy - Whether to be disclosed - Bare and general allegation - Whether sufficient to call for a trial - Whether frivolous - Order 81 Rules of the High Court 1980.*

This was an appeal against the decision of the learned Judge entering summary judgment for the respondent (the plaintiff) for specific performance of an agreement dated 4 November 1991 (the first agreement).

In this case the 1st to the 4th defendants had purchased some parcels of land from two co-proprietors. Soon thereafter, the 1st defendant, purportedly on behalf of the other defendants, had negotiated to sell the said land to the plaintiff at an agreed price of RM4.8 million, and following that, a deposit equivalent to 5% of the purchase price was paid by the plaintiff. This sale, nevertheless, did not materialise. The parties then re-negotiated the sale and subsequently, on 4 November 1991, they entered into a sale and purchase agreement (the first agreement) to effectuate the sale of the land. By this agreement, however, the parties had agreed to reduce the price from RM4.8 million to RM3,253,966.85. This state of affairs was confirmed by the affidavits affirmed, among others, by the 1st and the 3rd defendants.

In accordance with the terms of the agreements which the 1st to the 4th defendants had with the two co-proprietors earlier, the land was transferred to the fifth defendant, a private limited company in which the 1st to the 4th defendants were the shareholders and directors. Subsequently, on 7 April 1993, a fresh agreement was executed between the defendants and plaintiff (the second agreement), by which the 5th defendant undertook to honour the obligations of the vendors under the first agreement. *Inter alia*, the 5th defendant undertook to execute a valid and registrable memorandum of transfer in respect of the said land in the plaintiff's favour.

Disputes arose between the directors of the 5th defendant, and the result was that the latter decided to delay the promised transfer of the land. The plaintiff,

having fulfilled all its obligations, issued a writ and took out a summons for summary judgment of the first agreement pursuant to O. 81 Rules of the High Court 1980. The 2nd, 3rd and 5th defendants contested the judgment and so filed their defence. In their defence, the defendants admitted that the price had been reduced from RM4.8 million to RM3,253,966.85 after negotiations, but alleged conspiracy between the plaintiff's manager, the 1st defendant and the solicitors, whereby the true price of the land which was in excess of RM4.8 million was concealed from them and the 4th defendant. The learned trial Judge found no evidence of any conspiracy, and in any case concluded that mere allegation of conspiracy was insufficient to order a trial, and consequently granted the plaintiff's application. Hence, this appeal by the three defendants.

Held:

Per Shaik Daud Mohd. Ismail, Gopal Sri Ram JJCA (V.C. George JCA concurring):

[1] Based on the evidence both in affidavits and documentary this Court can only agree with the learned Judge that there was no basis for the matter to go to trial. The 3rd defendant, by his affidavit affirmed and admitted that the original purchase price was RM4.8 million but after negotiations with the plaintiff the price was reduced to RM 3,253,966.85. In the light of this clear admission, the averment by the defendants that the actual price had been concealed from them makes no sense. In the face of this admission one cannot have conspiracy. The learned Judge was thus right in rejecting this averment as an issue to be tried, and as being unreasonable and unfounded.

[2] It seems clear on the authorities that a mere general allegation of fraud is not sufficient and the party making the allegation is required to condescend to particulars. The same principle applies to allegations of conspiracy. In this case, the defendants merely made a bare and sweeping allegation of the conspiracy. No particulars of the alleged conspiracy has been disclosed in their affidavit. What the defendants succeeded in raising at best is a mere suspicion and this certainly is not sufficient.

[Appeal dismissed].

***[Bahasa Malaysia** Translation of Headnotes]*

***AMALAN & PROSEDUR:** Penghakiman terus - Samada diberikan secara wajar - Penghakiman terus untuk pelaksanaan spesifik perjanjian jual beli - Pembelaan komplot - Samada terdapatnya isu-isu yang boleh dibicarakan - Butir-butir komplot yang dikatakan - Samada harus didedahkan - Pengataan am dan mutlak - Samada memadai untuk memanggil suatu perbicaraan - Samada remeh - Aturan 81 Kaedah-Kaedah Mahkamah Tinggi 1980.*

Ini merupakan rayuan terhadap keputusan Hakim yang bijaksana yang memasuki penghakiman terus bagi responden (plaintif) untuk perlaksanaan spesifik sesuatu perjanjian bertarikh 4 November 1991 (perjanjian pertama).

Dalam kes ini defendan-defendan pertama hingga keempat telah membeli beberapa bidang tanah daripada dua tuanpunya-bersama. Segera selepas itu, defendan pertama, bertindak bagi pihak defendan-defendan yang lain, telah berurusan untuk menjual tanah tersebut kepada plaintif pada harga yang telah dipersetujui sebanyak RM4.8 juta, dan berikutan itu, wang deposit bersamaan dengan 5% dari harga belian telah dibayar oleh plaintif. Penjualan ini, namun begitu, tidak menjadi kenyataan. Pihak-pihak tersebut dengan itu telah merundingkan semula penjualan tersebut dan berikutan itu, pada 4 November 1991, mereka telah memasuki perjanjian (perjanjian pertama) bagi menguatkuasakan penjualan tanah tersebut. Melalui perjanjian ini, walaubagaimanapun, pihak-pihak tersebut telah bersetuju untuk mengurangkan harga tersebut daripada RM4.8 juta kepada RM3,253,966.85. Hal ini telah disahkan melalui afidavit-afidavit yang telah diikrarkan, antara lainnya, oleh defendan-defendan pertama dan ketiga.

Menurut terma-terma perjanjian-perjanjian tersebut yang mana defendan pertama hingga keempat telah masuki dengan kedua-dua tuanpunya-bersama tersebut pada awalnya, tanah tersebut telah dipindahmilik kepada defendan kelima, sebuah syarikat sendirian berhad dalam mana defendan-defendan pertama hingga keempat merupakan pemegang-pemegang saham dan pengarah-pengarah. Berikutan itu, pada 7 April 1993, satu perjanjian baru telah disempurnakan antara defendan dan plaintif (perjanjian kedua), melalui yang mana defendan kelima mengakujanji untuk menghormati kewajipan-kewajipan penjual tersebut di bawah perjanjian pertama. Antara lainnya, defendan kelima mengakujanji untuk menyempurnakan memorandum pindahmilik yang sah dan boleh didaftarkan berhubung dengan tanah tersebut atas nama plaintif.

Pertikaian telah berbangkit antara pengarah-pengarah defendan kelima, dan akibatnya adalah bahawa pihak terkemudian membuat keputusan untuk melengahkan pemindahan tanah tersebut sepertimana yang dijanjikan. Plaintif, setelah memenuhi kesemua kewajipan-kewajipannya, telah mengeluarkan satu writ dan memulakan saman untuk penghakiman terus terhadap perjanjian pertama tersebut selaras dengan A. 81 Kaedah-kaedah Mahkamah Tinggi 1980. Defendan-defendan kedua-ketiga dan kelima mencabar penghakiman tersebut dan dengan itu telah memfailkan pembelaan mereka. Dalam pembelaan mereka, defendan-defendan tersebut mengakui bahawa harga tersebut telah dikurangkan daripada RM4.8 juta kepada RM3,253,966.85 selepas perundingan, tetapi telah mengatakan berlaku komplot antara pengurus plaintif, defendan pertama dan peguamcara, di mana harga sebenar tanah tersebut, yang melebihi RM4.8 juta, telah disembunyikan daripada pengetahuan mereka dan defendan keempat. Hakim perbicaraan yang bijaksana tidak mendapati apa-apa keterangan mengenai apa-apa perbuatan komplot, dan walau bagaimanapun berkeputusan

bahawa pengataan semata-mata mengenai komplot adalah tidak memadai bagi memerintahkan satu perbicaraan, dan berikutan itu telah membenarkan permohonan plaintif. Oleh itu, rayuan ini telah dimulakan oleh ketiga-tiga defendan tersebut.

Diputuskan:

Per Shaik Daud Mohd. Ismail & Gopal Sri Ram HMR (V.C. George HMR menyetujui):

[1] Berdasarkan keterangan tersebut kedua-duanya dalam afidavit dan dokumentari, Mahkamah ini hanya boleh bersetuju dengan Hakim yang bijaksana bahawa tidak terdapat asas bagi menyarankan perbicaraan untuk perkara tersebut. Defendan ketiga, melalui afidavitnya berikrar dan mengakui bahawa harga belian asal adalah RM4.8 juta tetapi selepas perundingan dengan plaintif, harga tersebut telah dikurangkan kepada RM3,253,966.85. Memandangkan pengakuan yang jelas ini, penegasan oleh defendan-defendan bahawa harga sebenar telah disembunyikan daripada pengetahuan mereka tidak berasas. Berdasarkan kepada pengakuan ini seseorang tidak mungkin telah melakukan komplot. Tuan Hakim yang bijaksana adalah dengan itu betul dalam menolak penegasan ini sebagai satu isu untuk dibicarakan, dan sebagai tidak berasas serta tidak wajar.

[2] Ianya jelas dari autoriti-autoriti bahawa pengataan secara umum semata-mata mengenai fraud tidak memadai dan pihak yang membuat pengataan itu adalah dikehendaki untuk mengemukakan butir-butir. Prinsip yang sama terpakai kepada pengataan mengenai perbuatan komplot. Dalam kes ini, defendan hanya membuat pengataan mengenai perbuatan komplot yang tidak berasas dan mendadak. Tidak terdapat butir-butir mengenai komplot yang dikatakan itu telah didedah dalam afidavit mereka. Apa yang defendan telah berjaya bangkitkan sebaiknya merupakan suatu kesangsian dan ini tentunya tidak memadai.

[Rayuan ditolak].

Cases referred to:
Bank Negara Malaysia v. Md. Ismail [1992] 1 CLJ 627, [1992] 1 MLJ 400 ***(foll)***
Cannock District Council v. Kelly [1978] 1 WLR 1 ***(foll)***
See Hua Daily News Sdn. Bhd. v. Tan Thien Chin & Ors. [1986] 2 MLJ 107 ***(foll)***
Miles v. Bull [1968] 3 WLR 1090 ***(refd)***
Concentrate Engineering Pte. Ltd. v. United Malayan Banking Corp. Bhd. [1990] 3 MLJ 1 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 14 r. 3(1), O. 81

For the defendant - R.J. Manecksha, M/s. Ong & Manecksha
For the plaintiff - Gan Teik Chee, (Ramson Ho with him); M/s. Gan Teik Chee & Ho

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JUDGMENT

Shaik Daud Mohd. Ismail JCA:

This is an appeal by the 2nd, 3rd and 5th defendants in the Court below (now the appellants) from an order of the Penang High Court entering summary b judgment for specific performance pursuant to O. 81 Rules of the High Court 1980. At the outset it may be pertinent to state that there are in fact two transactions in this matter. In the first transaction the 1st to 5th appellants purchased a piece of land in Seberang Perai Tengah from the beneficial owners of the land in question. This transaction in fact is a subject of another c proceeding which is not concerned in this appeal. In the second transaction the plaintiffs (now the respondent) i.e. Ramanda Sdn. Bhd. purchased a portion of the said land from the 1st to 4th defendants who are also the shareholders and directors of the 5th appellant. A company formed for the sole purpose of receiving the transfer of the land in the first transaction.

d According to the statement of claim on 4 November 1991 a written agreement was entered into between the 1st to the 4th defendants which I will refer to as the first agreement. In this first agreement the defendants agreed to sell the land in question to the plaintiffs for a sum of RM3,253,966.85. Before this on 24 May 1991 the plaintiffs had paid to their solicitors 10% of the purchase e price i.e. RM325,396.70 to be paid to the 1st to 4th defendants after the first agreement had been signed. Be that as it may, the 10% was in fact paid to the defendants even before the first agreement was signed on the request of the 1st defendant on the undertaking given that the sum paid shall be refunded if the first agreement for some reason or other is not signed.

f The relevant terms which need be noted in first agreement are as follows:

(a) a sum of RM650,793.36 which is 20% of the purchase price had to be paid by the plaintiffs to the defendants' solicitors as stake holder within three months of the date of the first agreement, and plaintiff had in fact g fulfilled this terms;

(b) the sum of RM650,793.36 should only be released to the defendants by their solicitors after plaintiff had received from the defendants a letter of approval from the authorities pertaining to zoning of the land to industrial;

h (c) the balance of purchase price i.e. RM2,277,776.79 is to be paid to the defendants within six months from the date of the receipt of the letter of approval pertaining to zoning of the land to industrial;

(d) the defendants are required to hand over vacant possession of the land on the receipt of the final balance of the purchase price; i

(e) the plaintiffs are entitled to specific performance of the first agreement; and

(f) time wherever mentioned is of the essence.

Pursuant to the above mentioned terms the defendants' solicitors informed the plaintiff's solicitors by facsimile dated 26 June 1992 that the authorities had approved the zoning of the said land to industrial. Following this the date for the completion of the sale would be 26 December 1992. On the receipt of the letter of approval, a sum of RM650,798.36 was released to the defendants by their solicitors. Upon nearing the completion date of the first agreement, the land in question was transferred to the 5th defendant and as a result a novation agreement had to be entered into in order to complete the sale of the land to the plaintiffs and also to enable the plaintiffs to arrange for their loan before the plaintiff could release the balance of the purchase price. As a result of this the completion date of the first agreement had to be postponed.

According to the plaintiffs, only one additional agreement was in fact made and that is one dated 7 April 1993 and the relevant terms are:

(a) that this was to be additional to the first agreement;

(b) the 5th defendant is to execute a valid transfer capable of being registered to the plaintiffs when required by the 1st to the 4th defendants;

(c) 1st to 4th defendants undertook to direct the 5th defendants to execute a valid transfer capable of being registered to the plaintiffs on the plaintiffs complying with all the terms of the first agreement; and

(d) 5th defendant confirm and agree that all payments including the purchase price which plaintiffs, had to pay under the first agreement be paid to the 1st to 4th defendants.

The plaintiffs on their part had complied with the terms of the first agreement but when it came time for the sale and purchase to be completed the 5th defendant defaulted. The plaintiffs accordingly issued a writ and moved a summons for summary judgment.

The 2nd, 3rd and 5th defendants filed their statement of defence wherein they admitted that the 5th defendant is the registered owner of the said land and that the 1st to 4th defendants are the shareholders and directors of the 5th defendant. They also admitted that the first agreement dated 4 November 1991 was entered into between the plaintiffs and the 1st to 4th defendants. They, however, averred that the original purchase price was RM4.8 million but after negotiations was reduced to RM3,253,966.85. They, however, also averred that there was a conspiracy between the manager of the plaintiffs, 1st defendant and the solicitors for the defendants whereby the true price of the land which was in excess of RM4 million was concealed from the 2nd, 3rd, 4th and 5th

defendants. It would appear that the difference in the purchase price would be shared between them.

This in fact is their main defence. In their memorandum of appeal they averred that the learned Judge of the High Court failed to consider the evidence of a possible conspiracy. Being an application for a summary judgment under O. 81 Rules of the High Court 1980 the learned Judge after considering the contents of all the affidavits and after hearing submissions came to the conclusion that there are no triable issues as there was no evidence to show the allegation of the so called conspiracy and he also was of the view that there are no other reasons for the matter to go to trial and consequently he ordered specific performance and costs, and also ordered an enquiry as to damages.

Now being an application for summary judgment under O. 81 which is a procedure similar to O. 14, the defendant need only to show that there is a triable issue or that there ought for some other reasons to be a trial of the action. As mentioned earlier the 2nd, 3rd and 5th defendant's main defence to the plaintiff's application for summary judgment is the allegation of the conspiracy. It goes without saying that if they succeed on this the learned Judge ought to have dismissed the plaintiff's application and grant them leave to defend. In this case the learned Judge came to the conclusion that the mere allegation of conspiracy was not sufficient for him to order a trial and in fact he came to a finding, based as it were, on the affidavits and contemporary documents that there was no conspiracy as alleged. In *Bank Negara Malaysia v. Md. Ismail* [1992] 1 MLJ 400 which was relied upon by the learned Judge the Supreme Court held:

> Under an O. 14 application, the duty of the Judge does not end as soon as a fact is asserted by one party, and denied or disputed by the other in an affidavit. Where such assertion, denial or dispute is equivocal, or lacking in precision or is inconsistent with undisputed contemporary documents or other statements by the same deponent, or is inherently improbable in itself, then the Judge has a duty to reject such assertion or denial thereby rendering the issue not triable. Unless this principle is adhered to, a Judge is in no position to exercise his discretion judicially in an O. 14 application.

In order to appreciate the learned Judge's refusal to accept the allegation of a possible conspiracy as asserted to by the 2nd, 3rd, and 5th defendants it is I think quite pertinent to consider the chronology of events which led to the writ being filed.

When the first agreement was signed on 4 November 1991 it was also signed by the 2nd, 3rd and 5th defendants and the said agreement clearly and unequivocally expressed that the purchase price of the land to be RM3,253,966.85, and this was admitted to by the three of them in their statement of defence. In their statement of defence they also admitted that

originally the purchase price was RM4.8 million and after negotiation it was reduced to RM3,253,966.85. Then over a year later the same three defendants signed the additional agreement on 7 April 1993 which agreement confirmed the first agreement signed on 4 November 1991. In an affidavit sworn to by 3rd defendant at paragraph 24.1 and 24.2 he affirmed and admitted that the original purchase price was RM4.8 million but after negotiations with the plaintiff the purchase price was reduced to RM3,253,966.85. Therefore in the light of the clear admission it seems strange that they now say the actual purchase price was concealed from them. Where, therefore, is the concealment? They knew all along that the purchase price was in fact reduced. Neither one of them raised this issue of the possible conspiracy in any of the various correspondences between solicitors. Then out of the blue and after having admitted that they knew the purchase price had been reduced, they in 1994 raised this issue. In their defence they also raise the issue that the balance in the actual purchase price and the concealed purchase price would be shared between the so called conspirators. This averment makes no sense as the first agreement merely states that the purchase price is RM3,253,966.85 and the defendants knew that the purchaser will pay that amount and they could also receive that same amount therefore from where is the difference in the amount coming? In the light of this that learned Judge was right in rejecting this averment as an issue to be tried, as being unreasonable and unfounded.

The defendants appear to rely on two receipts for a sum of RM244,000 being 5% of the original purchase price one issued by one Maikal Yasu dated 29 May 1990 and one issued by M/s. Cheong Wai Meng for RM178,573.35 dated 24 May 1991 being part of the second 5% of the purchase price. These two receipts had been sufficiently explained in the affidavit of 1st defendant affirmed on 9 June 1994, and has also been sufficiently considered by the learned Judge in his grounds of judgment.

Based on the evidence both in affidavits and documentary the learned Judge made a specific finding that these was no basis for the matter to go for trial, I am entirely in agreement with that finding. This Court sitting in an appellate capacity can find no reason to interfere with that finding. One aspect of the matter appears not to have been considered by the learned Judge, but in the light of his finding it makes no difference, and that is the question of general allegations of conspiracy advanced by the defendants. On my perusal of the statement of defence it seems that the defendant merely made a bare and general allegation of the conspiracy. In the statement of defence they claimed that the so called conspiracy was entered into between the manager of the plaintiffs, 1st defendant and one Mr. Cheong Wai Meng. Neither the name nor the identity of the plaintiff's manager has been disclosed in their affidavits in reply, nor has it been revealed the role played by the manager. Most important of all I find that no particulars of the alleged conspiracy has been disclosed in their affidavits. The 1st defendant in his affidavit had categorically

denied the allegation of conspiracy and has sufficiently explained the circumstances heavily relied upon by the defendants in support of their allegation which explanation found favour with the learned Judge. What the defendants sought to do is merely make sweeping and general allegations of the alleged conspiracy without alluding to any particulars. The authorities are clear on general allegations of fraud and they are equally applicable to such allegations of conspiracy. In *Cannock District Council v. Kelly* [1978] 1 WLR 1; in considering whether an allegation of bad faith on the part of a local authority by a tenant of its house who had been given a notice to quit, the Court of Appeal held that:

> If a charge of bad faith is made against a local authority, they are entitled to have it properly particularised. If it has not been pleaded, it may not be asserted at the hearing. If it has been pleaded but not properly particularised, the pleading may be struck out.

This principal should apply with greater force in cases of allegations of a conspiracy or fraud. In *See Hua Daily News Sdn. Bhd. v. Tan Thien Chin & Ors.* [1986] 2 MLJ 107 the Supreme Court in considering allegations of fraud held that "the failure of the, appellants to condescend upon particulars of the fraud in their affidavits is fatal". It seems clear that on the authorities, a mere general allegation of fraud is not sufficient and the party making the allegation is required to condescend to particulars. The same principle applies to allegations of conspiracy. After giving my serious consideration I am of the view that what the defendants succeeded in raising at best is a mere suspicion and this certainly is not sufficient. The learned Judge was therefore right in ordering summary judgment and I find no merits in the present appeal and therefore dismissed it with costs here and in the Court below.

Gopal Sri Ram JCA:

The appellants before us are the second, third and fifth defendants in the Court below: the other defendants have not appealed. The appeal is directed against an order made in open Court on 6 July 1994, decreeing specific performance of an agreement dated 4 November 1991. The order appealed against was granted summarily against all defendants pursuant to O. 81 of the Rules of the High Court, 1980. Earlier, when the respondent's summons for judgment was heard in chambers, the learned Judge had granted leave to defend without condition. However, in accordance with the procedure which was then in force, the Judge entertained an application by the respondent (the plaintiff in the Court below) for further argument, and, having heard such argument, reversed his decision made in chambers and made an order in terms of the summons. We heard and dismissed this appeal on 9 January 1995. I now hand down my reasons for the decision reached.

Now, it is necessary to have a clear understanding of the history and background to the dispute between the parties in order to appreciate the

conclusions arrived at by the learned Judge and his reasons for them. In this judgment I shall interchangeably refer to the parties in accordance with the title assigned to each of them in the suit or as they appear before this Court, as convenience dictates.

The land which is the subject matter of the present litigation is known as Holding No. 1152, Mukim 14, Seberang Perai Tengah, Penang ("the said land"). It was one of four parcels owned by two co-proprietors. The first to the fourth defendants entered into negotiations with the co-proprietors to purchase all four parcels. At about the same time, the first defendant entered into negotiations to sell the said land to the plaintiff. The price was agreed at RM4.8 million. Ng Kim Lim, the managing director of the plaintiff paid a sum of RM244,000 as 5% deposit towards the purchase price. He paid it to Mr. Maikal Yasu, the solicitor who was then acting for the matter on instructions given to him by the first defendant. He got a receipt for it in his name. That receipt is dated 29 May 1990 and it is one of the documents which has featured prominently in the case.

On the same day, i.e., 29 May 1990, Mr. Maikal Yasu wrote to Ng Kim Lim in which he said that he was acting for the first defendant as the vendor of the said land. It is a very long letter and I do not propose to reproduce it here. Suffice to say that it sets out, in some detail, the terms and conditions of the sale. This sale, however, did not materialise. Later, the parties re-negotiated the sale and entered into a formal written sale and purchase agreement. It is dated 4 November 1991 and I shall refer to it as "the first agreement". According to the plaintiff, the parties agreed to reduce the price from RM4.8 million to RM3,253,966.85. This figure was arrived at on the basis that each square foot of the said land cost RM3.20. This state of affairs is confirmed by the affidavit affirmed by the first defendant on 9 June 1994 and filed by him on his own behalf and on behalf of the fourth defendant.

Recitals 6 and 7 of the first agreement which set out the process by which the first to the fourth defendants acquired the said land read as follows:

> 6. By a Sale and Purchase Agreement dated 27 August 1991 (a copy of which is annexed hereto and marked 'A') made between the said Personal Representatives of the one part and the Vendor [being a collective reference to the first to the fourth defendants] of the other part, the said Personal Representatives agreed to sell and the Vendor agreed to purchase their respective undivided share of the said Property subject to the terms and conditions contained therein.
>
> 7. By a Sale and Purchase Agreement dated l5 October, 1991 (a copy of which is annexed hereto and marked 'B') made between the said Registered Proprietor, the said Administratrix and the said Beneficiaries of the one part and the Vendor of the other part, the said Registered Proprietor, the said

Administratrix and the said Beneficiaries agreed to sell and the vendor agreed to purchase their respective undivided share of the said property subject to the terms and conditions contained therein.

The first agreement also made provision for separate representation: Messrs Cheong Wai Meng & Van Buerle were solicitors for the defendants, while Messrs Ronald Chee & Associates were to act for the plaintiff. As it transpired, Mr. Cheong Wai Meng played a role that seems to have placed him in a position where his personal interest appears to have conflicted with his professional duties. But that is a matter which, as will appear later, has no bearing upon the respondent's claim for specific performance.

Each agreement which the four defendants had with the previous co-proprietors contained a nomination clause which required the co-proprietors to transfer the land to any person nominated by the former. Pursuant to that clause, the said land was transferred to and registered in the name of a private limited company (the third appellant, who was the fifth defendant in the Court below) in which the first to the fourth defendants took shares. They are also its directors.

Clause 2 of the first agreement provided for the balance of the purchase price amounting to RM2,928,570.15 to be paid in the following manner:

(1) a sum of RM650,793.36, that is 20% of the purchase price, was to be paid to the defendants' solicitors within three months from the date of the first agreement. That sum was to be held by them on a monthly renewable fixed deposit until receipt of a letter from the relevant authority approving the said land for industrial use. Upon receipt of that letter, this sum was to be released to the defendants;

(2) a sum of RM2,277,776.79 being the remaining 70% of the purchase price within 6 months from the date of receipt by the plaintiff's solicitors of the letter of approval mentioned in the preceding subparagraph.

The first agreement also contained a provision relating to the delivery of vacant possession upon the payment of the balance of the purchase price. And there was the usual stipulation making time of the essence.

On 26 June 1992, the defendants' solicitors wrote to the plaintiff's solicitors informing them that the relevant local authority had approved the re-zoning of the said land for industrial use. Acting in accordance with the terms of the agreement, the defendants' solicitors released the sum representing 20% of the price to their clients.

I have already made mention of the registration of the said land in the fifth defendant's name. This probably took place on 10 October 1992, because that is the date on which the transfers in favour of the fifth defendant company were presented to the registering authority. In consequence, on 7 April 1993, a fresh agreement ("the second agreement") was entered into between the

defendants of the one part and the plaintiff of the other part. The Judge called it a "novation agreement", although, having read that document, I am not at all sure if that is an accurate description.

By the terms of the second agreement the fifth defendant company in effect bound itself to the several obligations of the vendors under the first agreement. It also undertook to execute a valid and registrable memorandum of transfer in the plaintiff's favour, provided that the plaintiff was not in breach of any of its obligations under the first agreement.

The plaintiff, having fulfilled all its obligations, called for a transfer in its favour. It received a response from the defendants solicitors to the effect that there were disputes among the directors of the fifth defendant, and as such completion would be delayed. The plaintiff then issued writ on 15 December 1993 and took out the summons to which I have made reference earlier in this judgment.

The first and fourth defendants did not resist the plaintiff's application. Instead, as I had earlier observed, they, through their solicitors, delivered, an affidavit verifying the events as deposed to by the plaintiffs general manager, Mr. Eng Hooi Hwa in support of the summons for judgment.

The second, third and fifth defendants delivered a defence alleging a conspiracy to defraud. The main thrust of their case lies in paragraphs 4 and 5 of their defence, which, by reason of the criticism levelled against the learned Judge, I shall reproduce in full. They read as follows:

> 4. With reference to paragraph 8 of the statement of claim, these defendants state as follows:
>
> 4.1 The agreement dated 4 November, 1991, was entered into between the plaintiffs of the one part and the first 3 defendants of the other part;
>
> 4.2 The purchase price mentioned therein was stated as RM3,253,966.85, after negotiations held with the plaintiffs to reduce it from the original demand price of RM4.88 million;
>
> 4.3 Sometime after the Main Agreement and Supplemental Agreement referred to in paragraph 15 of the statement of claim were signed and the property registered in the name of the fifth-named defendants, the second and third named defendants became aware that a conspiracy was entered into between the manager of the plaintiffs, the first-named defendant and Mr. Cheong Wai Meng, a partner in the firm of Messrs. Cheong Wai Meng & Van Buerle, then solicitors for the defendants, to conceal from the second and third named defendants the fact that in fact the purchase price was RM4.88 million as originally demanded and that the difference between the aforestated sums would be paid to and be divided between the 3 said persons.

Evidence of such conspiracy appears from the following:

(i) Receipt No. 156 dated 29 May 1990 issued by Mr. Maikal Yasu, Advocate & Solicitor, Penang, to Mr. Ng Kim Lim, managing director of the plaintiffs, *via* Public Bank Berhad cheque No. 824161 for RM244,000 being 5% of the purchase price;

(ii) Receipt No. 23033 dated 24 May 1991, from Messrs. Cheong Wai Meng & Van Buerle, Advocates & Solicitors, Penang, to the plaintiffs for RM178,573.35 being part of the second 5% of the purchase price, and

(iii) Receipt No. 23032 dated 24 May 1991, from Messrs. Cheong Wai Meng & Van Buerle to the plaintiffs for RM81,396.70 *via* Public Bank Berhad cheque No. 475432 being part of the second 5% of the purchase price, with interest.

5. These defendants have no knowledge of the said sum of RM325,396.70 or any sum at all being paid, as alleged, towards the purchase price and state that if the said sum had been paid to the first-named defendant, as alleged, the first-named defendant had not accounted to these defendants for the same.

It is now necessary to refer to the relevant paragraphs of the affidavit affirmed by the second defendant in opposition to the summons for judgment. They read as follows:

4. I refer to the defence filed herein on behalf of myself and the other defendants referred to in paragraph 2 above and reiterate what is stated in paragraph 4 thereof

5. In particular I reiterate that Tang Yeam Soon, the third-named defendant and I became aware that a conspiracy was entered into between the manager of the plaintiff, the first-named defendant and Mr. Cheong Wai Meng, a partner in the firm of Messrs. Cheong Wai Meng & Van Buerle, the then solicitors for the defendants, to conceal from the third defendant and myself that in fact the actual purchase price was RM4.88 million and not RM3,253,966.85 which is a peculiar sum for the purchase price.

6. I now annex herewith a receipt No. 156 dated 29 May 1990, issued by Maikal Yasu acknowledging payment to him of the sum of RM244,000 being 5% of the purchase price from one Ng Kim Lim who is the managing director of the plaintiffs. The sum referred to in fact constitutes 5% of RM4.88 million. The receipt is annexed and marked 'A1'.

7. I now display a receipt No. 23033 dated 24 May 1991, issued by Messrs. Cheong Wai Meng & Van Buerle for the sum of RM178,573.35 and receipt No. 23032 dated the same day, for RM81,396.70 also issued by the same solicitors, the total amount of which constitutes the second 5% of the purchase price with interest for delayed payment. The 2 receipts are herewith annexed and marked 'A2' and 'A3 respectively.

8. These receipts are proof that in fact the purchase price is RM4.88 million and not RM3,253,966.85.

9. 1 now annex herewith a copy of a letter dated 28 May 1991, issued by one Eng Hooi Hwa, the general manager of the plaintiffs, to Mr. Maikal Yasu stating that as the sale and purchase transaction had come to an end, he acknowledges the return of the sum of RM244,000. The copy of the said letter is marked 'A4'.

10. The contents of this letter is in direct contradiction to exhibit 'A2' and 'A3' which both constitutes a further 5%, together with interest for delayed payment, of the purchase price.

11. These receipts in fact confirm that the purchase price was in fact RM4.88 million and not as averred by the plaintiffs in the statement of claim.

12. The letter annexed i.e. 'A4' in fact confirms that a conspiracy exists as pleaded in my defence to defraud the third and fifth defendants and myself of a certain amount of money.

Encik Manecksha submitted that although he could not point to any specific issue that required a trial, the circumstances surrounding the case called for further investigation at a trial: in the words of O. 14 r. 3(1), "there ought for some other reason to be a trial". In support of his submission, he relied on the following passage in the judgment of Megarry J. in *Miles v. Bull* [1968] 3 WLR 1090, an authority with which practitioners are quite familiar and which was applied by the High Court of Singapore in *Concentrate Engineering Pte. Ltd. v. United Malayan Banking Corp. Bhd.* [1990] 3 MLJ 1:

> In these circumstance it is necessary to examine the precise wording of O. 14. Under the former O. 14 r. 1, a defendant could obtain leave to defend if he satisfied the Judge that he had a good defence to the action on the merits, or disclose 'such facts as may be deemed sufficient to entitle him to defend the action generally'. I do not see how that can be said to be the case here. The language of O. 14 has, however, been changed, and it is the new language that I must apply.
>
> Under rr. 3 and 4 of the present O. 14, the defendant can obtain leave to defend if (and I read from r. 3(1)) the defendant satisfies the Court 'that there is an issue or question in dispute which ought to be tried or, that there ought for some other reason to be a trial'. These last words seem to me to be very wide. They also seem to me to have special significance where, as here, most or all of the relevant facts are under the control of the plaintiff, and the defendant would have to seek to elicit by discovery, interrogatories and cross-examination those which will aid her. If the defendant cannot point to a specific issue which ought to be tried but nevertheless satisfies the Court that there are circumstances that ought to be investigated, then I think that those concluding words are invoked. There are cases when the plaintiff ought to be put to strict proof of his claim, and exposed to the full investigation possible at a trial; and in such cases it would, in my judgment, be wrong to enter summary judgment for the plaintiff. In the present case the plaintiff's evidence initially consisted of a single affidavit in which brevity could scarcely be carried further. He has now amplified this by further evidence, but this is certainly not exhaustive or conclusive. The words 'there ought for some other reason to be a trial' seem to me to give the Court

> adequate powers to confine O. 14 to being a good servant and prevent it from being a bad master. If I may adapt the language of Lord Parker of Waddington in *Daimter Company Ltd. v. Continental Tyre & Rubber Co. (Great Britain) Ltd.* [1916] 2 AC 307, referred to in the notes to O. 14 in the Supreme Court Practice 1967, p. 123, if the circumstances of the case are 'such as to require close investigation this will 'preclude the propriety of giving leave to sign judgment under O. 14 r. 1.' The question is thus whether this is such a case. I think it is. In my judgment 'there ought for some other reason to be a trial'; and the reason is that of justice. By carrying through a transaction at unusual speed the defendant's husband is seeking to enable the plaintiff to do what he himself cannot do, namely, evict the defendant from her home. The husband has whatever rights the law gives him, and so has the plaintiff; but in the circumstances of the case I do not think that it would be just if the plaintiff were able to enforce the rights which he claims without being put to strict proof what they do enable him to evict the defendant. I was told that, in granting leave to defend, Master Jacob said that the case was 'too near the bone for O. 14.' That, if I may say so, seems to me to summarize admirably what I have tried to express in greater detail. Order 14 is for the plain and straightforward, not for the devious and crafty. There is here a case for investigation, and so not for summary decision.

I also bear in mind what Bramwell LJ said in *Harrison v. Bottenheim* [1878] 26 WR 362. Even on the old wording of O. 14:

> though a man cannot show a defence, still, if he has shown enough to entitle him to interrogate the plaintiff, the case is not within O. 14, and should not be pursued without his being allowed to defend.

> Bramwell LJ also referred to the remarkable fact that that action was on a bill of exchange three years old, and so the case was one of a stale claim, a circumstance perhaps matched by the remarkable promptitude of completion in the case before me.

Counsel also criticised the learned Judge for failing to undertake a judicial appreciation of the nature of the defence taken. He referred this Court to the reliance by the Judge on paragraph 4.2 of the defence and complained that the defence should be read as a whole and together with the affidavit filed in opposition to the summons for judgment.

Now, I am quite satisfied that there is no merit in the arguments advanced by Counsel. I also think that the learned Judge's reversal of himself in open Court was correct. In a carefully considered judgment the learned Judge disposed of what Counsel considered to be the several unsatisfactory features that took this case out of the summary jurisdiction. I am entirely in agreement with the views he has expressed. In my judgment, there are several reasons why this appeal should fail.

In the first place, the submission of Counsel based on the documentary exhibits completely overlooks the previous aborted transaction between the parties in which Mr. Maikal Yasu acted on the instructions of the third defendant. Some

of these exhibits relate to the earlier aborted transaction; others to the transaction under the first agreement whereby the said land was sold at an agreed lower price. What the appellants have done is to mix both of these up and on that basis allege a conspiracy to defraud. Each of the several documents has been explained in the affidavit of Eng Hooi Hwa affirmed on 9 June 994 and filed on the respondent's behalf. The learned Judge appears to have accepted that explanation. Having considered all the circumstances of the case and the relevant evidence adduced, I am unable to disagree with the view formed by the learned Judge. As I observed at the outset, it is important to understand the history of the dispute between the parties. Viewed against the background of the events that transpired prior to the execution of the first agreement, the documents relied upon by the appellants do not lend any assurance whatsoever to the charge made by them. It follows that this is not a case that comes within the category that Megarry J had in mind in *Miles v. Bull (supra).*

Secondly, neither in the defence nor in the affidavit in opposition are there any particulars of the alleged fraud or conspiracy. It is of no consequence that the defence does not condescend to particulars. After all, this was an application under the summary jurisdiction so that there was no obligation on the part of the appellants to even deliver a defence. But the affidavit must do so. The strictness with which this rule as to pleading has to be observed, even in cases coming within the summary procedure, is demonstrated by the decisions in *Cannock Chase District Council v. Kelly* [1978] 1 WLR 1 and *See Hua Daily News Bhd. v. Tan Thien Chin* [1986] 2 MLJ 107. In the latter case, Mohamed Azmi SCJ when dealing with a charge of fraud raised by a defendant in an application under O. 14 said:

> Having regard to the factual situation in this case, we see no reason to disturb the finding of the learned Judge that the allegation of fraud is not only frivolous but also not *bona fide*. The reasons given by the learned Judge for coming to this conclusion are well founded. **Firstly, the failure of the appellants to condescend upon particulars of the fraud in their affidavits is fatal.** (Emphasis added).

I think that his Lordship's words are apposite to the present case. Here too, it would appear that the charge of conspiracy to defraud is not made *bona fide* and that there are certainly no particulars in support of it.

Lastly, there is a clear admission in paragraph 4.2 of the defence that the price asked for was RM4.8 million and that it had been negotiated down to RM3,253,966.85. It caught the eye of the learned Judge and he formed the view that this really demolished any suggestion that the second agreement was not above board. I am unable to see any error on the part of the learned Judge in this respect. Indeed I am entirely in agreement with the conclusion that one cannot have a conspiracy in the face of that admission. Additionally,

there appears to be a contradiction between this paragraph of the defence and the averments in the affidavit which I have set out earlier in this judgment, thereby demonstrating the lack of *bona fides* on the part of the apellants when they took the point. On the totality of all the evidence presented before the learned Judge, I am satisfied that the allegation of a conspiracy to defraud is altogether frivolous and made without any basis. Practitioners must remember that taking a plea of fraud is a serious matter and that no such plea ought to be put on the record in the absence of sufficient material in support.

Having given this matter my most anxious consideration, I came to the conclusion that the Judge was entirely correct in the decision he arrived at upon the further argument. There are really no triable issues here. Neither is there any other reason for a trial. As such, the appeal had to be, and was, dismissed with costs. The usual order directing the deposit in Court to be paid out to account of the respondent's costs was also made.

V.C George JCA:

I have had the benefit of reading the judgments of my brothers Shaik Daud, JCA and Gopal Sri Ram, JCA with whose views of the matter I am in full agreement. Like them, I am also far from satisfied with what were put up by or on behalf of the defendants as issues to be tried as being *bona fide* issues. I agree that the appeal should be dismissed with costs here and in the Court below.